Supreme Court, U.S.
FILED
OCT 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-370

In the Supreme Court of the United States

OCTOBER TERM, 1986

JERRY G. BRENNAN, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

App

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-370

JERRY G. BRENNAN, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The court of appeals in this civil case affirmed the judgment of the district court on April 3, 1986 (Pet. App. 18a). A timely petition for rehearing was denied on June 2, 1986 (Pet. App. 19a). Petitioner did not obtain an extension of time within which to file a petition for a writ of certiorari. The time for filing a petition accordingly expired on September 2, 1986, a Tuesday following a federal legal holiday. See 28 U.S.C. 2101(c). The petition was not filed until September 5, 1986. The petition, which was filed pro se, was not accompanied by a notarized statement by a member of the Bar of this Court stating that the mailing took place on a particular date within the permitted time. See this Court's Rule 28.2. The petition is therefore out of time. The time limit provided by Section 2101(c) is jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

In his supplemental brief (at 2), petitioner asserts that the petition is nevertheless timely because it was filed within 90 days of June 10, 1986, the date on which the court of appeals denied his suggestion for rehearing en banc. See Pet. App. 20a. This assertion is altogether meritless. By its terms, Rule 20.4 extends the time to petition for certiorari only by the additional time required to decide a "petition for rehearing." The Rule does not provide a similar extension for the disposition of a suggestion for rehearing en banc. Indeed, the rationale underlying Rule 20.4 is that "[a] timely petition for rehearing tolls the running of the three-month period because it operates to suspend the finality of the [lower] court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties." *Department of Banking* v. *Pink*, 317 U.S. at 266. Accord *United States* v. *Dieter*, 429 U.S. 6, 8-9 (1976); *United States* v. *Healy*, 376 U.S. 75, 77-80 (1964). But Fed. R. App. P. 35(c) states plainly that "[t]he pendency of * * * a suggestion [for rehearing en banc] whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate." Accordingly, unlike a petition for rehearing, a suggestion for rehearing en banc does not affect the finality of the judgment and thus cannot extend the time to petition for a writ of certiorari. Accord, R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 312-314 (6th ed. 1986).[1] Petitioner's time to seek certiorari thus ran from June 2, 1986, the date on which his petition for rehearing was denied.

---

[1]Petitioner errs in relying (Supp. Br. 3 n.1) on *United States* v. *Healy, supra*, and *Panico* v. *United States*, 375 U.S. 29 (1963), for the proposition that a suggestion for rehearing en banc extends the time for seeking certiorari under Section 2101(c). The *Healy* case involved a petition for rehearing, not a suggestion for rehearing en banc, and the Court's

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[2]

CHARLES FRIED
Solicitor General

OCTOBER 1986

---

analysis was plainly limited to the former. See 376 U.S. at 77, 78-79. And while the Court's opinion in *Healy* does state that in *Panico* an order extending the time to file a petition for certiorari was entered 19 days after en banc review was denied by the court of appeals, *Panico* was a criminal case in which timely filing of the petition was not a jurisdictional prerequisite.

[2]Because this Court is without jurisdiction to entertain the petition, we are not responding to petitioner's contentions on the merits. Those contentions, however, were thoroughly addressed by the court of appeals in its opinion (Pet. App. 1a-17a). We will, of course, respond on the merits if the Court so requests.